BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAE DENISE CLARK (formerly VAUGHN)	)	
Claimant	)	
VS.	)	
	)	Docket No. 251,436
CESSNA AIRCRAFT COMPANY	)	
Respondent	)	
AND	)	
	)	
KEMPER INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

Claimant appealed the July 8, 2002 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on December 20, 2002, in Wichita, Kansas.

APPEARANCES

Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Board, the parties agreed claimant's pre-injury average weekly wage was $937.13, as determined by the Judge.

ISSUES

In the July 8, 2002 Award, Judge Clark determined claimant was entitled to receive permanent disability benefits for a five percent functional impairment to the left shoulder as a scheduled injury under K.S.A. 1999 Supp. 44-510d.

Claimant contends Judge Clark erred. Claimant argues that she has sustained a 47.5 percent work disability (a permanent partial general disability greater than the whole body functional impairment rating). Claimant also initially contested the Judge's finding of

the pre-injury average weekly wage. But, as indicated above, at oral argument before the Board the parties agreed claimant's average weekly wage on the date of accident (October 18, 1999) was $937.13. Claimant also argues that she was terminated from respondent's employment without just cause and, consequently, her work disability commenced January 14, 2000, the date she was terminated.

On the other hand, respondent and its insurance carrier argue that the Award should be affirmed. They contend claimant did not permanently injure her neck while working for respondent and, therefore, the Judge was correct in awarding claimant benefits for a scheduled injury to the left upper extremity and left shoulder.

Respondent and its insurance carrier also argue, in the alternative, that claimant has no work disability as any neck injury that she may have sustained did not require permanent work restrictions. They also argue claimant voluntarily terminated her employment after respondent had cited her for misconduct that would have resulted in her termination. Accordingly, respondent and its insurance carrier contend claimant is not entitled to receive a work disability should the Board find claimant has sustained a permanent neck injury.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified to grant claimant permanent partial general disability benefits for a nine percent whole body functional impairment.

The request for a work disability is denied.

The Board finds and concludes that claimant permanently injured her neck and left shoulder while working for respondent. The evidence is overwhelming that claimant experienced neck pain and that she received substantial medical treatment for her neck following an October 18, 1999 incident at work. On that date, claimant was lying on a wing and working with her neck in an awkward position when she began having sharp pains into her left shoulder and left arm.

A company doctor initially sent claimant to physical therapy. The physical therapist found abnormal range of motion in claimant's neck and, therefore, focused therapy on both claimant's left shoulder and her neck. In December 1999, one of the company doctors, Dr. Barcelo, ordered an MRI of claimant's neck.

Later, on February 2, 2000, claimant saw another of the company doctors, Dr. Larry Wilkinson, who diagnosed chronic neck pain. Because of claimant's neck symptoms, Dr. Wilkinson ordered nerve conduction tests. Dr. Wilkinson also referred claimant to a neurosurgeon, Dr. Paul S. Stein, to determine what was causing claimant's neck pain.

In March 2000, claimant saw Dr. Stein, who diagnosed a soft tissue injury to the neck.

Dr. Wilkinson saw claimant for the last time on March 27, 2000, as she did not return for a scheduled follow-up visit. The doctor's final diagnosis was chronic neck pain. Because of claimant's neck complaints, the doctor somewhat modified claimant's work restrictions and restricted her from reaching overhead more than six times per hour, and restricted her from pushing, pulling and lifting more than 20 pounds.

One of the last doctors to treat claimant, Dr. Frederick R. Smith, first saw claimant on March 28, 2000. That doctor diagnosed cervical strain and began treating claimant's neck. As part of his prescribed treatment, Dr. Smith referred claimant for a cervical epidural injection, which was administered in May 2000 and which relieved claimant's neck symptoms for approximately three months. Dr. Smith's final diagnosis was cervical strain superimposed upon degenerative changes in claimant's neck. Accordingly, the doctors who treated claimant diagnosed a neck injury.

Likewise, the physicians who were asked to evaluate claimant for purposes of this claim also indicated that claimant has permanent impairment to her neck. Claimant's medical expert, Dr. Pedro A. Murati, examined claimant in January 2001 and diagnosed neck pain secondary to bulging discs between the fourth and fifth (C4-C5) and fifth and sixth (C5-C6) intervertebral levels of the cervical spine. Based upon claimant's neck injury, Dr. Murati rated claimant as having a 13 percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (AMA *Guides*).

Finally, Dr. Philip R. Mills, who examined claimant at the Judge's request, testified that claimant experienced pain in her neck that would constitute permanent impairment under the AMA *Guides*. Dr. Mills testified, in part:

> Q. (Mr. Pistotnik) Doctor, I think we already talked about this but you were basically asked to do an independent medical exam for the Court in this case, right?
>
> A. (Dr. Mills) Yes.
>
> Q. As a result of that independent medical exam for the Court you sent a report to the Court indicating a 5 percent to the whole body based on a DRE [diagnosis-

related estimates] Cervical Thoracic Category II impairment based on the Fourth Edition of the AMA Guides for the Evaluation of Permanent Impairment?

A. That's correct.

Q. And today you just testified that she [claimant] has a 5 percent to the shoulder which translates to 3 percent to the whole body?

A. Well, that is because I was asked a different question.

Q. Okay.

A. I was asked to rate the myofascial type pain in the left shoulder girdle, so I was just sorting out what that 5 percent whole body would be. The 3 percent of the whole body would be for the myofascial pain in that left shoulder. The AMA Guides don't sort things out.

Q. So, basically, 2 percent was due to the myofascial pain that she had in her neck?

A. Yes. In the DRE Cervical Thoracic Category, that would include the bulging discopathy. That would include anything that -- the diagnostic-related categories don't sort it out and so, basically, if I understood Mr. Kuhn's question, he was asking me specifically on the shoulder and so I responded specifically on the shoulder.[1]

. . . .

Q. All right. But to make sure we're clear, you do believe she has an impairment based on the neck and shoulder?

A. She would have for her bulging discopathy and the myofascial pain, she would have a 5 percent to the body as a whole, which is secondary to the DRE Cervical Thoracic Category II listing there in the AMA Guides.[2]

Averaging the 13 percent whole body functional impairment rating provided by Dr. Murati with the five percent whole body functional impairment rating provided by Dr. Mills, the Board finds claimant has sustained a nine percent whole body functional impairment as a result of her October 18, 1999 work-related accidental injury.

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[1] Mills Depo. at 8-9.

[2] *Id.* at 11.

As indicated above, claimant's request for a work disability is denied.

Although there are differences among the various witnesses regarding the facts behind claimant's termination, a common thread is that claimant reported several minutes late to work on January 14, 2000, and respondent's representatives believed claimant was being dishonest by either denying that she was late or by asking that her time records reflect that she had arrived on time. But the most damaging testimony comes from union representative Paul Dykstra, who investigated the company's allegations of claimant's misconduct and determined the allegations were valid.

According to Mr. Dykstra, who was then the union plant chairman, on the day claimant was terminated she admitted to the misconduct. Consequently, Mr. Dykstra concluded the union could not prevent claimant from being terminated. Mr. Dykstra then discussed with claimant about entering into an agreement with respondent in which she would voluntarily quit and the company would not contest her claim for unemployment benefits. Claimant accepted those terms.

Because claimant's injuries comprise an unscheduled injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e, which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the above-quoted statute's

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon his or her ability to earn wages rather than the actual wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.

On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[6] where the accommodated job violates the worker's medical restrictions,[7] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[8]

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. Contrary to claimant's contentions, the Board concludes claimant violated respondent's company rules, resulting in her termination. Conversely, the Board concludes respondent did not act in bad faith in terminating claimant.

Under these facts, claimant's misconduct was tantamount to making less than a good faith effort to retain her employment.

Consequently, for purposes of determining claimant's permanent partial general disability, the wage that claimant was earning immediately before her termination should

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[5] *Id.* at 320.

[6] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[7] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[8] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

be imputed as claimant's post-injury wage for purposes of the permanent partial general disability formula. Because that post-injury wage, including the additional compensation items, was at least 90 percent of claimant's pre-injury average weekly wage, claimant's permanent partial general disability should be limited to her nine percent whole body functional impairment rating.

AWARD

WHEREFORE, the Board modifies the July 8, 2002 Award and grants claimant a nine percent permanent partial general disability.

Jae Denise Clark (formerly Vaughn) is granted compensation from Cessna Aircraft Company and its insurance carrier for an October 18, 1999 accident and resulting disability. Based upon an average weekly wage of $937.13, Ms. Clark is entitled to receive 37.35 weeks of permanent partial disability benefits at $383 per week, or $14,305.05, for a nine percent permanent partial general disability, making a total award of $14,305.05, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation